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No. 84-137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Appellant's Reply Brief	1
The Instant Appeal is Timely and Should Not be Dismissed	1
The State Should Not be Permitted a Second Attempt to Convict the Defendant Where it Voluntarily Chose to Terminate Her First Trial	4
Conclusion	9

TABLE OF AUTHORITIES

	Page
Cases:	
Great Western Tel. Co. v. Burnham (1896) 162 U.S. 339, 16 S. Ct. 850	2
Minneapolis, St. P. and S.S.M. Ry. Co. v. Rock (1929)	2
People v. Davidson (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978	5
People v. Flatt (1980) 82 Ill. 2d 250, 412 N.E. 2d 509	5
People v. Johnson (1983) 113 Ill. App. 3d 367, 69 Ill. Dec. 285, 447 N.E. 2d 502	5
People v. Rogers (1984) ___ Ill. App. 3d ___, 79 Ill. Dec. 73, 463 N.E. 2d 211	5
Reece v. Georgia (1955) 350 U.S. 85, 76 S. Ct. 167	2
Richardson v. United States (1984) ___ U.S. ___, 104 S. Ct. 3081, ___ L. Ed. 2d ___	3

United States v. Appawoo (10th Cir. 1977) 553 F. 2d 1242 ..... 6, 7

United States v. Moore (C.A.C.D. 1979) 613 F. 2d 1029 6, 7

United States v. Scott (1978) 437 U.S. 82, 98 S.Ct. 2187, 57 L. Ed. 2d 65 7

Urie v. Thompson (1949) 337 U.S. 163, 69 S. Ct. 1018 .. 2

Virginian Railway v. Muellens (1926) 271 U.S. 220, 46 S. Ct. 526 2

Constitutional Provisions and Statutes:

Illinois Revised Statutes, Chapter 110A, Section 604 (a)(1) 4, 5, 6,8

Illinois Revised Statutes, Chapter 110A, Section 604(f) . 2, 3

18 United States Code, Section 3731 4

18 United States Code, Section 1623(d) 6

28 United States Code, Section 1257(2) 1

28 United States Code, Section 1257(3) 1

28 United States Code, Section 1291 3

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I

THE INSTANT APPEAL IS TIMELY AND SHOULD NOT BE DISMISSED

The State in its Motion to Dismiss Appellant's appeal (pages 2-7) asserts that Appellant's notice of appeal to the United States Supreme Court was not timely filed. The State claims that Appellant had an Order appealable under 28 *United States Code,* §1257(2) or (3), at the conclusion of her first state court appeal on October 4, 1983, but that since Appellant did not pursue such appeal at that time she may not now do so.

The State's assertions are in error for several reasons:

1. The double jeopardy issue now advanced would have been untimely and not ripe for review immediately following Appellant's first state court appeal for the reason that at that time no effort had been made to bring her to trial a second time. Had an appeal to the United States Supreme Court been filed following October 4, 1983, the State could properly have sought dismissal because the question of double jeopardy was then premature.

2. Illinois state law (*Illinois Revised Statutes,* Chapter 110a, §604(f)) provided for further state review of Appellant's double jeopardy claim following Appellant's first state court appeal. Exhaustion of this state remedy was required before appeal in the United States Supreme Court. *Minneapolis, St. P. and S.S.M. Ry. Co. v. Rock* (1929), 279 U.S. 410, 49 S. Ct. 363; *Virginian Railway v. Muellens* (1926) 271 U.S. 220, 46 S. Ct. 526.

Had Appellant filed her appeal to the United States Supreme Court following October 4, 1983, such appeal could have been dismissed for failure to exhaust all available state remedies.

3. The fact that the highest court of the state in a second appeal refuses to consider the federal issue decided in a first appeal does not deprive the United States Supreme Court of jurisdiction to review the second judgment. *Reece v. Georgia (1955), 350 U.S. 85, 76 S. Ct. 167; Urie v. Thompson* (1949), 337 U.S. 163, 69 S. Ct. 1018; *Great Western Tel. Co. v. Burnham* (1896), 162 U.S. 339, 16 S. Ct. 850. Such is the case here.

4. Appellant waited to prosecute her appeal to the United States Supreme Court until she had exhausted all available state remedies and until she had an actual controversy ripe for review. The exhaustion of her second appeal available under state law was a prerequisite and a necessary requirement preparatory to appeal to the United States Supreme Court.

5. The procedurally analogous case of *Richardson v. United States* (1984), ____ U.S. ____, 104 S. Ct. 3081, ____ L. Ed. 2d ____, illustrates the timeliness of the instant appeal. In *Richardson,* the defendant was acquitted of one of three counts, the remaining two counts resulting in a hung jury. No appeal was taken following the first trial. The prosecution sought to bring defendant to trial a second time on the counts which had resulted in a hung jury. The defendant then moved to bar retrial of the remaining counts based on claims of double jeopardy. The District Court denied defendant's motion and the Court of Appeals dismissed the defendant's appeal of such denial for lack of jurisdiction. The United States Supreme Court, on certiorari, reversed the adverse jurisdictional determination and held that defendant presented a "colorable" double jeopardy claim which was appealable before his second trial.

In the instant case, Appellant's double jeopardy claim is no less a colorable one than that of the defendant in *Richardson* merely because an appeal by the State intervened between Appellant's first and second trials. The first state appeal is not a bar to the instant appeal, since it was brought by the State, was a procedural extension of the improper termination of Appellant's first trial, and is a part of the basis of the present double jeopardy claim.

Appellant's double jeopardy claim is likewise appealable before her second trial. In this respect, *Illinois Revised Statutes,* Chapter 110a, §604(f) and 28 *United States Code,* §1291, as interpreted, parallel each other. Here the claim of double jeopardy directly stems from the state's improper termination of Appellant's first trial to appeal evidentiary rulings.

The instant appeal, therefore, is timely and should not be dismissed.

II

THE STATE SHOULD NOT BE PERMITTED A SECOND ATTEMPT TO CONVICT THE DEFENDANT WHERE IT VOLUNTARILY CHOSE TO TERMINATE HER FIRST TRIAL.

The State claims Appellant's appeal presents no substantial question for decision because Illinois Supreme Court Rule 604(a)(1) purportedly goes no further in permitting mid-trial appeal than does the existing federal rule. Existing federal case law interpreting the federal rule on mid-trial appeal as constitutional under the Double Jeopardy Clause is therefore advanced by the State in support of the constitutionality of the "similar" Illinois rule.

Such analogy by the State is in error because the Illinois Rule is wholly dissimilar to the present federal rule on the double jeopardy point here at issue. Indeed, the Illinois Rule goes far beyond what has been held constitutionally permissible in interpretation of this prevailing federal rule.

The State claims (Motion to Dismiss, page 10) that 18 *United States Code,* §3731 constitutionally permits mid-trial State appeals of suppression rulings in criminal cases over a defendant's objection after jeopardy has attached, and that therefore the "analogous" Illinois rule is similarly permissible under the Double Jeopardy Clause. Such assertion misrepresents §3731 and the cases cited by Appellee in support of this interpretation.

Title 18, *United States Code,* §3731, provides:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence...in a criminal proceeding, not made after the Defendant has been put in jeopardy...

Illinois Supreme Court Rule 604(a)(1), on the other hand, specifically permits state appeals of suppression rulings in

criminal cases after the defendant has been placed in jeopardy. Contrary to the State's assertion (Motion to Dismiss, page 8-9), Rule 604 both on its face and as construed by the Illinois Supreme Court in *People v. Flatt* (1980) 82 Ill. 2d 250, 412 N.E. 2d 509, and as here applied, goes far beyond that previously determined permissible under the Double Jeopardy Clause by permitting mid-trial appeal of "suppression" rulings.

The State asserts the supposed narrowness of the Illinois rule in support of its constitutionality (Motion to Dismiss, page 9), arguing that it is only "suppression" rulings which are appealable under the rule, as distinguished from mere evidentiary rulings (Motion to Dismiss, page 6a). Yet the Supreme Court of Illinois in *Flatt* (Motion to Dismiss, page 6a, 8a) itself recognized "the difficulty involved in defining that which constitutes an order of suppression". Indeed several conflicting definitions of that which constitutes a suppression have developed in Illinois. Compare *People v. Davidson* (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978, with *People v. Johnson* (1983) 113 Ill. App. 3d 367, 69 Ill. Dec. 285, 447 N.E. 2d 502, and *People v. Rogers* (1984) ____ Ill. App. 3d ____, 79 Ill. Dec. 73, 463 N.E. 2d 211.

Whether called a suppression or an exclusion of evidence, Illinois Supreme Court Rule 604 (a)(1) in any event permits a prosecutor in a criminal case after jeopardy has attached and over a defendant's specific objections to the contrary, to terminate a jury trial and appeal an evidentiary ruling which prevented the introduction of some kind of evidence before the jury and then to retry the same defendant for the same offense before a different jury.

Whether the adverse ruling appealed constitutes a "suppression" or an "exclusion" is a distinction without a constitutional difference under the Double Jeopardy Clause. The fact remains that the prosecutor himself voluntarily chose to terminate Appellant's trial after jeopardy had attached, that Appellant ob-

jected to the termination, and that the final result sought by the State is to commence Appellant's trial anew for the same offense before a different trier of fact. Appellant respectfully submits therefore that Illinois Supreme Court Rule 604 (a)(1) offends the Double Jeopardy Clause regardless of whether it is only suppressions which are appealable by the State mid-trial.

If such loosely defined "suppressions" are constitutionally appealable mid-trial, there is no constitutional bar to the mid-trial appeal of rulings heretofore known as "exclusions", leaving the prosecutor free to appeal mid-trial, notwithstanding the attachment of jeopardy, any adverse evidentiary ruling which he is willing to certify is injurious to his chances of conviction.

In support of its claim that mid-trial appeals of suppression rulings after jeopardy has attached are constitutionally permitted by federal courts, and therefore by analogy are constitutionally permitted under the Illinois rule, the State cites *United States v. Moore* (C.A.C.D. 1979) 613 F. 2d 1029 and *United States v. Appawoo* (10th Cir. 1977) 553 F. 2d 1242. These cases do not at all support the State's position, however, since neither were mid-trial appeals. Instead, both were appeals of cases which had been dismissed on motion of the defendant prior to verdict. In each case at the time of the appeal the case itself was concluded.

In *Moore,* the defendant moved for dismissal of a four-count perjury indictment after jeopardy had attached, claiming that the prosecution was barred by the recantation provision of 18 *United States Code,* §1623(d). The court erroneously allowed defendant's motion and dismissed the case. In *Appawoo,* the defendant moved to dismiss before trial but the trial court did not consider the motion until the jury was impaneled and sworn and jeopardy had attached. At the conclusion of the government's case, the trial court "acquitted" the defendant by granting his pre-trial motion to dismiss.

Similar and particularly illustrative is *United States v. Scott* (1978), 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65. In *Scott* the trial court dismissed a two-count indictment at the close of the government's case. The defendant had moved prior to trial for dismissal on the grounds of pre-indictment delay, but the court did not rule until the government rested. The government's appeal was dismissed by the Court of Appeals on double jeopardy grounds and the United States Supreme Court reversed, holding that where a defendant himself successfully seeks to have his trial terminated prior to a determination of guilt or innocence and on a ground unrelated to that determination, the government may appeal from such termination without offending the Double Jeopardy Clause.

The profound difference between the instant case and the situations in *Moore, Appawoo* and *Scott,* is that in the instant case, it was the State which terminated Appellant's trial after jeopardy had attached and over Appellant's repeated objections, whereas in the cases cited by the State, it was the defendant himself who moved to terminate his own trial prior to a determination of guilt or innocence. At the trial in the instant case, Appellant argued in the strongest terms that her trial should continue and that its termination by the State was improper. Conversely, in *Moore, Appawoo* and *Scott* it was the defendant who voluntarily sought termination of the trial prior to verdict upon a ground unrelated to guilt or innocence. No federal case has been found under which re-trial was constitutionally permitted notwithstanding double jeopardy where the State on a ground unrelated to guilt or innocence terminated the trial over defendant's objection after jeopardy attached so as to appeal a suppression ruling.

A further distinction between the cited federal case law and the instant case is that *Moore, Appawoo* and *Scott* had all been completely terminated prior to appeal. No further trial court evidentiary proceedings were contemplated, as the dismissals were intended to conclude each case with finality. The termina-

tion of the Appellant's case by the State, on the other hand, was never intended to end further trial court evidentiary proceedings. It was rather designed to interrupt her trial to permit the State to obtain an appellate ruling in aid of her subsequent prosecution for the same offenses before a different jury. Appellant's second and subsequent prosecution will not be a continuation of the first trial but rather will be a completely new trial before a completely new trier of fact.

The State here does not deny that Appellant's trial was terminated by the State itself over Appellant's specific objections after jeopardy had attached. It argues instead that the court's "erroneous" evidentiary rulings at trial forced the State to terminate the trial to avoid loss of the trial. The State claims that the making of such evidentiary objections by Appellant is constitutionally analogous for double jeopardy purposes to a motion by Appellant to terminate the trial.

Respectfully, the Appellant disagrees with such analysis and conclusion. In the instant case, the State voluntarily elected to seek termination of the trial over the Appellant's specific and repeated objections, knowing full well that jeopardy had attached. Here it is not the defendant, as in the *Scott* case, but rather the State which is responsible for the second prosecution.

The State, in effect, seeks an exception to the Double Jeopardy Clause under which a defendant's evidentiary objection is tantamount to an election to forego his right to have his guilt or innocence determined by the first trier of fact. This court should not adopt such a rule.

While the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice to terminate trial prior to verdict, it should protect a defendant from re-trial where the State rather than the defendant improperly terminated the original trial. Any statute, such as Illinois Supreme Court Rule 604(a)(1), which permits such improper terminations as a matter of course should not be permitted to stand.

The State here voluntarily chose to terminate Appellant's trial and it should not now be permitted a second attempt at conviction. Nor should a state court rule permitting such multiple trials be permitted to stand. A substantial question is therefore presented and this appeal should not be dismissed.

CONCLUSION

This appeal is timely and presents a substantial and colorable double jeopardy claim. Therefore the appeal should not be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that a true and correct copy of the above, foregoing and attached Appellant's Reply Brief was duly served upon the attorney of record of all parties to the above entitled cause required to be served, by enclosing the same in an envelope duly addressed to such attorney at his business address as disclosed by the pleadings of record herein, with first class postage fully prepaid, and by depositing said envelope into a United States Post Office mailbox located in the Village of East Alton, State of Illinois, on the 11th day of Sept, A.D., 1984.

SUSAN E. DAVIDSON,
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STATE OF ILLINOIS

SS.

COUNTY OF MADISON

AFFIDAVIT

Donald E. Groshong, being first duly sworn according to law, on oath deposes and says that he has read the above, foregoing and attached Certificate of Service and that he is familiar with the contents thereof and the matters contained therein, and that they are true and correct to the best of his knowledge and belief.

Donald E. Groshong, Affiant

SUBSCRIBED and SWORN to before me this 11th day of September, 1984.

Notary Public

My Commission Expires: 7/29/85